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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1224

BILLY MAYES, WILLIAM ALBERT HUDSON, SHIRLEY BASHAM, FRED TABOR, JIMMY THOMPSON, HUBERT HARRISON, WILLIAM HOUK, NATHAN McDANIEL, LARRY GANN, LARRY SUDDETH, JAMES DENNISON, JAMES HENDRICKS, CARROLL RAY PEMBERTON, LEWIS H. BEWLEY, LARRY OSBORN, L. C. COOK, ERNEST FRANK FOWLER, CHESTER CRAWLEY AND JAMES DONALD NEWBERRY, *Petitioners*,

VERSUS

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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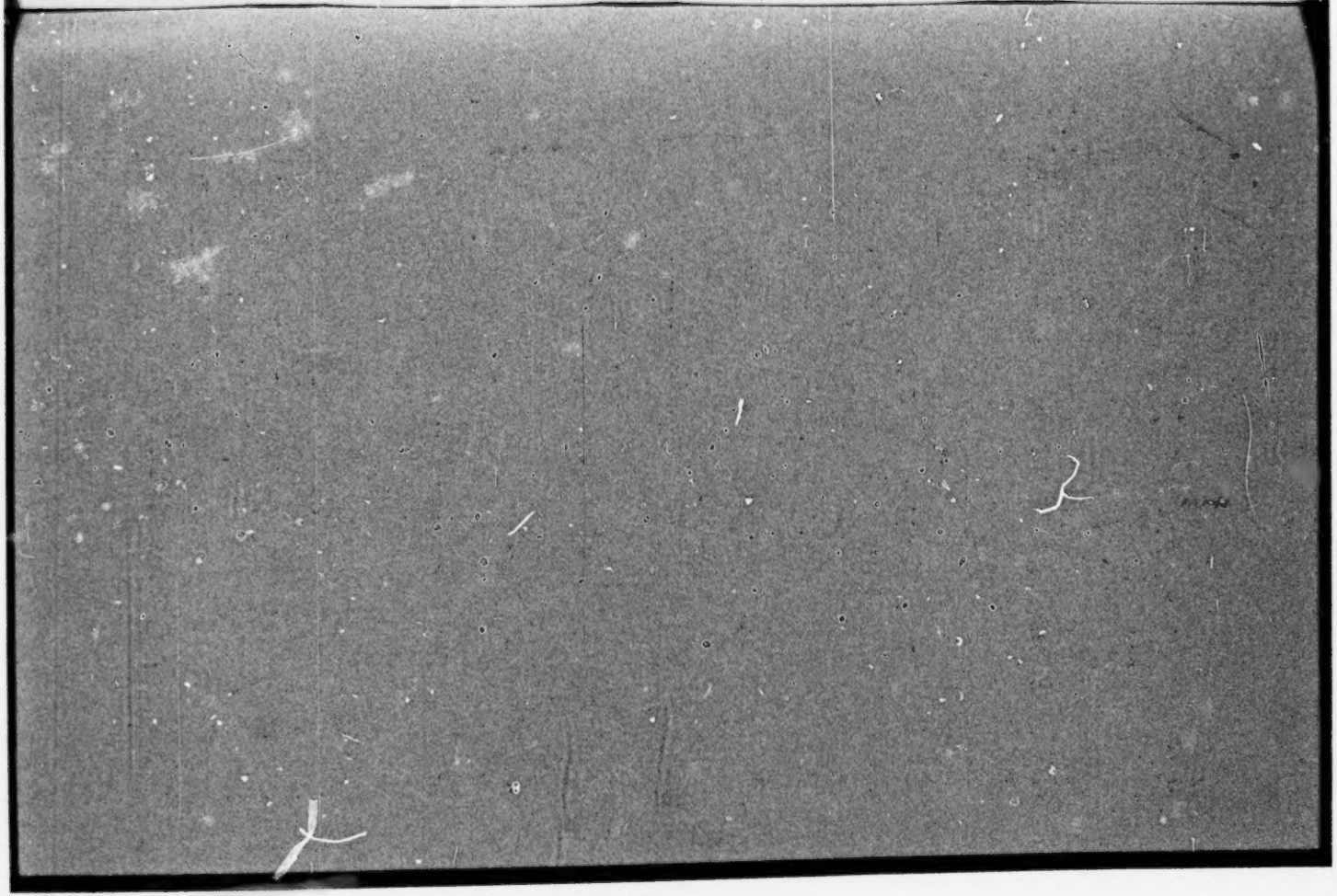

SUBJECT INDEX

THE OPINION BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED FOR REVIEW 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 11

(1) Review by the Court is imperative to resolve questions of exceptional importance for the administration of criminal justice in the Federal system; to insure decisional uniformity in the review and disposition of Federal criminal conspiracy convictions by the Courts of Appeals; and to resolve a conflict among the circuits in the interpretation and application of the Court's opinions in *Kotteakos v. United States*, 328 U.S. 750 (1946) and *Berger v. United States*, 295 U.S. 78 (1935). 11

(2) The opinion of the Court of Appeals leaves untouched the substantial and recurring problems of due process created by the procedurally oppressive Federal criminal conspiracy prosecution. The Court should accept the opportunity presented by this case to confront and resolve those problems. 21

CONCLUSION 24

APPENDIX "A" A-1

APPENDIX "B" A-34

LIST OF AUTHORITIES

CASES	Page
Barnard v. United States, 342 F.2d 309, 313 (9 Cir., 1965)	19
Berger v. California, 393 U.S. 314, 315 (1969)	24
Berger v. United States, 295 U.S. 78 (1935)	11, 13
Bollenbach v. United States, 326 U.S. 607 (1946)	14
Bruton v. United States, 391 U.S. 123, 135-37 (1968)	24
Chambers v. Mississippi, 410 U.S. 284, 295 (1973)	24
Delli Paoli v. United States, 352 U.S. 232 (1957)	14, 15
Dutton v. Evans, 400 U.S. 74, 89 (1970)	24

CASES

	Page
Kotteakos v. United States, 328 U.S. 750 (1946) 2, 11, 12, 13, 15, 16, 17, 19, 20	
Krulewitch v. United States, 336 U.S. 440 (1949) 5, 20, 21	
McElroy v. United States, 164 U.S. 76 (1896)	14
Rocha v. United States, 288 F.2d 545, 552-53 (9 Cir., 1961)	19
Schaffer v. United States, 362 U.S. 511 (1960)	14
United States v. Borelli, 336 F.2d 376, 383-87 (2 Cir., 1964)	19
United States v. Goss, 329 F.2d 180, 183-84 (4 Cir., 1964)	19
United States v. Perez, 489 F.2d 51, 60-61 (5 Cir., 1973)	19
United States v. Varelli, 407 F.2d 735, 742-48 (7 Cir., 1969)	19

UNITED STATES STATUTES

18 U.S.C. §371	3
18 U.S.C. §2312	1, 3
18 U.S.C. §2313	1, 3
28 U.S.C. §1254(1)	2

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nineteen Petitioners in the above styled and numbered cause respectfully pray that a writ of certiorari issue to review an opinion and judgment of the United States Court of Appeals for the Sixth Circuit, entered on February 25, 1975, which affirmed the conviction of each Petitioner under one count of an indictment alleging a conspiracy to violate the Dyer Act, 18 U.S.C. §2312 and §2313.

THE OPINION BELOW

The twenty-nine page opinion of the Court of Appeals, as yet unreported, is reproduced in Appendix A of this petition at pages A-1 - A-33.

JURISDICTION

Judgments of conviction against each Petitioner were entered by the District Court on May 24, 1973 and affirmed by the Court of Appeals on February 25, 1975.

The Petitioners invoke the Court's certiorari jurisdiction conferred by 28 U.S.C. § 1254(1). Filing of this petition was accomplished within 30 days from the date of entry of judgment by the Court of Appeals and was therefore timely under Rule 22(2).

QUESTIONS PRESENTED FOR REVIEW

(1) Whether the Petitioners' en masse indictment, trial and convictions for allegedly conspiring together to violate the Dyer Act are condemned by *Kotteakos v. United States,* 328 U.S. 750 (1946) because the Government's evidence did not prove a single conspiracy among all defendants but rather established at best the commission of a series of separate, independent and for the most part unrelated criminal transactions, none of which involved all defendants or any single defendant who participated in the commission of every offense, thereby depriving Petitioners of their right not to be tried for a "conglomeration of distinct and separate offenses committed by others."

(2) Whether the procedurally oppressive manner in which the Government prosecuted the Petitioners for conspiracy so severely impaired the integrity and reliability of the guilt-determining process as to constitute a denial of due process of law, where during the course of an eight-week jury trial the prosecution called and recalled more than 800 witnesses and introduced almost 600 separate documentary exhibits relating to 62 different

motor vehicles in an effort to prove the 71 overt acts, 10 explanatory averments and 18 subsidiary allegations contained in a single-count, 37-page indictment naming 28 defendants and 13 unindicted co-conspirators.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Federal constitutional claims of all Petitioners are grounded on the due process clause of the Fifth Amendment. The relevant provisions of the Federal conspiracy statute, 18 U.S.C. § 371, and the Dyer Act, 18 U.S.C. § 2312 and § 2313, are reproduced in Appendix B of this petition at page A-34.

STATEMENT OF THE CASE

On August 15, 1972 a Federal grand jury convened in the United States District Court for the Western District of Kentucky, Bowling Green Division, returned a 48-page, 25-count indictment charging 28 named defendants and 13 other individuals, named but not indicted,[1] with conspiring to violate the Dyer Act by allegedly participating in the interstate transportation, receipt and concealment of stolen motor vehicles in a 10-State area over a period of approximately three and one-half years. Count 1 of the indictment alleged a conspiracy among all defendants in violation of 18 U.S.C. § 371. Counts 2 through 25 charged eighteen of the defendants with individual substantive violations of 18 U.S.C. § 2312 and § 2313.[2]

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1. Several of these persons had previously pleaded guilty to a related Federal indictment returned in the Southern District of Indiana on December 15, 1971 and were among the Government's principal witnesses at trial.

2. On motion of the defendants the District Court severed the 24 substantive counts and ordered the trial to proceed on the conspiracy

The conspiracy count, by itself 37 pages long, related generally in ten separately numbered explanatory averments the methods and means by which the alleged conspiracy had been carried out. There followed a recital of eighteen separate substantive crimes allegedly undertaken by certain of the defendants "in furtherance of" the conspiracy and a list of 71 overt acts, virtually all of which constituted distinct and independent substantive offenses under Federal law, that were likewise allegedly committed by certain defendants to further the purported conspiracy. As framed by the indictment, no single one of these 89 particularized allegations related to all defendants, nor was any individual defendant alleged to have participated, directly or indirectly, in all 89 offenses. Rather, each transaction was alleged to have involved no more than five and frequently no more than one or two defendants and was claimed by the Government to have been undertaken by the individuals engaged in it simply in order to promote a single gigantic criminal enterprise in which all defendants had agreed to participate.

Some of the defendants (for example, Bewley, Osborn, Cook, Tabor, Thompson and Gann) were named in only one or two of the overt acts. Others were charged in connection with as many as 30 separate criminal acts. At least one (Newberry) was not alleged in the indictment to have engaged in any act to further the claimed conspiracy.

A grand total of 78 different motor vehicles, described by make, year model and vehicle identification number,

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count alone (R. 169, Mtn. Tr. 128-30), despite the Government's contention that "there may be ten or fifteen other trials, as opposed to one trial if they could all be disposed of at the same time" (Mtn. Tr. 130-31).

was set out in the conspiracy count of the indictment, although not every overt act was concerned directly with one of these automobiles. For example, the overt act alleged in paragraph 31 involved not a Dyer Act violation but an allegedly perjurous statement made by Defendant Pemberton to the grand jury. Similarly, paragraphs 68 and 70 described an asserted sub-plot among certain of the purported co-conspirators to murder two of their former confederates whom they believed to be cooperating with the Government's investigation of their activities.[3]

Following extensive pretrial proceedings the trial commenced on April 2, 1973 in Bowling Green, Kentucky and continued thereafter for approximately eight weeks. A memorandum prepared by the District Judge at its conclusion characterized the prosecution as "an exceptional case in many respects."[4] Seven attorneys appeared for the defense, representing clients whose individual interests and legal defenses were ultimately proven to have been antagonistic and irreconcilable. Both before and during the trial news media publicity surrounding the proceedings was intense and unremitting, despite the best efforts

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3. At trial the defense strenuously but unsuccessfully objected to the introduction of any evidence relating to the alleged assassination plots, the District Judge concluding that such episodes, if proven, would amount to acts in furtherance of the conspiracy alleged (Tr. 776-77, 773). Cf. *Krulewitch v. United States*, 336 U.S. 440 (1949).

4. Among other reasons leading the Judge to this conclusion was the circumstances that the United States Marshal had been requested to issue subpoenas for more than 1,000 prosecution and defense witnesses (R. 388, 3).

Because the Federal courthouse in Bowling Green was not large enough to accommodate all of the Government's witnesses at one time, they were assembled in a local movie theater to await their turn to testify.

of the Court and counsel to eliminate or minimize its prejudicial impact.[5] The voir dire examination revealed that virtually every prospective juror had heard some previous report of the case. Two women members of the jury panel who expressed fear for their personal safety were excused by the Trial Judge.

At the very outset a problem arose during jury selection concerning the manner in which defense counsel were to exercise on behalf of their respective clients the 24 peremptory challenges accorded to them by the Court. Some attorneys thought the Judge was requiring all defendants and their lawyers to agree on the manner in which each challenge was to be exercised. Others thought each of the 24 defendants on trial[6] had been given the

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5. Prior to trial the Government had filed a motion requesting that the case be transferred from Bowling Green to Louisville, citing "the extensive pre-trial publicity" associated with the prosecution (R. 156). The motion was denied (R. 169).

However, the District Court did grant another Government motion for district-wide (rather than division-wide) jury selection, in which the Government acknowledged that the case "has received extensive coverage by the local, state and national news media, to include coverage by newspapers, radio and television. Additionally, the defendants received extensive publicity based upon prior local trials by a persistent and demanding press, and perhaps the most damaging, general word of mouth from a very knowledgable community" (R. 155, 2).

The Judge likewise adopted the Government's motion for sequestration of the jury during the trial, agreeing with the suggestion in a supporting memorandum that, "given the proclivities of the local news media and the widespread publicity that has already attended this case, we expect the press coverage to intense during the course of trial" (R. 158, 2).

6. Of the original 28 defendants named in the indictment, one had died, one had pleaded guilty and two had not been apprehended by the time of trial.

opportunity to exercise one challenge. That difference was never definitely resolved.[7]

During the trial itself the Government called and recalled more than 800 witnesses and introduced into evidence almost 600 separate documentary exhibits relating to transactions involving 62 different vehicles, each of which was designated by a multi-digit vehicle identification number. The problem of relating the testimonial and documentary evidence to a particular transaction involving a specified defendant and a specified automobile was severely compounded by the fact that the vast majority of the vehicles stolen consisted of 1968, 1969 and 1970 Volkswagon sedans, with only a sprinkling of Fords, Chevrolets or other cars.

Moreover, although each of the Government's six principal witnesses to the alleged conspiracy—Max Jacob Bayer, Claude Dillon, Jr., C. W. Marcum, Cecil Wilson, Paul Bunton and Barry Lynn Clayton—was readily able to implicate most of the defendants in at least one criminal transaction involving a stolen or fraudulently acquired automobile, the astronomical number of thefts in which these witnesses had admittedly participated—possibly as many as 1,800—frequently made it impossible for them to recall the specific details associated with a particular

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7. Although the record is uncertain as to the Trial Judge's intention in this respect, it appears that the former view was correct. After the defense attorneys had used 21 of their 24 challenges, they advised the Court that they had reached an impasse and were simply unable to agree on how to exercise the remaining three. The Judge responded that absent an agreement the remaining challenges would go unexercised (Tr. 528-32).

The remaining three challenges were ultimately exercised under protest, after repeated objections to the jury selection procedures and motions for mistrial (Tr. 237-38, 245-46).

criminal episode or even to remember the month, year or State in which it had occurred.[8]

For present purposes it is unnecessary to analyse extensively the evidence (or lack of evidence) relating to each of the Petitioners. The Government presented its case by initially calling witnesses to inculpate each Petitioner in the most general and conclusory terms; then introduced testimony and documents to prove that a particular vehicle had been stolen and transported interstate; and finally recalled one or more witnesses in an effort to elicit evidence concerning the specific transaction involving that vehicle and the defendants allegedly involved in that transaction. In some instances that evidence was relatively strong. In others it was incredibly weak or nonexistent.[9]

On May 23, 1973, after both sides had rested, the District Court presented from notes an oral charge to the jury that covers nearly 100 pages of the trial transcript, prefacing that charge with the remark that the Court "can't expect you to remember everything I say to you"

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8. Predictably there was much testimony on cross-examination of these witnesses regarding their prior criminal records, the negotiations with the Government leading to their decision to testify and the effect of that decision on criminal prosecutions pending against them, and any promises or offers of immunity made by the Government.

All of the witnesses were convicted felons with extensive criminal records, and most had previously been accorded immunity or favorable sentencing recommendations.

9. The witness Max Jacob Bayer, whose evident purpose was to incriminate single-handedly everyone on trial, initially advised the Federal Bureau of Investigation that he had knowledge of from 40 to 45 automobile thefts. At trial he claimed to have participated in more than 250 (Tr. 1639-40).

(Tr. 8429). Throughout the charge the Court spoke in terms of a single conspiracy and the sufficiency of the evidence to prove the participation of the defendants in that conspiracy, rather than in terms of multiple, overlapping conspiracies involving a number of common participants and similar but not identical methods of operation and ultimate criminal objectives. At no point in the charge was the jury specifically apprised that it might find more than one conspiracy from the evidence presented. On the contrary, the Trial Judge specifically instructed otherwise:

> "There is some contention and claim about an Indiana conspiracy or that there were a number of conspiracies. *You are not to concern yourself about that.* There may be a dozen conspiracies going on at the same time. That doesn't eliminate the liability of those who participated in this one if you believe there was one. *But you must believe that this was one conspiracy, not a little group of conspiracies*" (emphasis added). (Tr. 8469).

Within minutes after the jury retired to consider its verdict, it requested permission to review a transcript of the evidence introduced during the trial (Tr. 8538-40). Of course, the District Judge denied that request.[10]

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10. The evident desire of the jury to review the voluminous evidence introduced during the eight weeks of trial, when coupled with the Trial Judge's instruction limiting the scope of the jury's inquiry to the contours of a single conspiracy, takes on extraordinary significance when viewed in light of the admission by William Barbee, one of the prosecution's chief witnesses, that he had initially advised the FBI that the automobile theft operations in and around Bowling Green were "not one big ring but groups of different individuals working on their own" (Tr. 2662-63).

The jury returned its verdict late on the afternoon of May 24, 1973 (R. 368, 5). Three of the defendants were acquitted, nineteen were found guilty.[11] Of those convicted, ten were sentenced to the maximum punishment of five years imprisonment and a $10,000 fine; seven were given two-year prison terms and $5,000 fines; and two were sentenced to confinement for a year and a day and a fine of $1,000.

In consolidated appeals, after extensive and obviously painstaking consideration of the case, the United States Court of Appeals for the Sixth Circuit affirmed each of the 19 convictions on February 25, 1975 in a 29-page opinion that rejected claims relating to an allegedly fatal variance between indictment and proof, prejudicial joinder, erroneous jury instructions, sufficiency of the evidence and the overall procedural fairness of the trial as a whole.

Because the full flavor and variety of this 9,000-page, four-foot thick, 50-pound record cannot be satisfactorily captured within the confines of a petition for certiorari, counsel for the Petitioners have arranged for it to be certified and transmitted to the Clerk pursuant to the Court's Rule 21 so that it may be readily available for consideration with the petition.

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11. One defendant pleaded guilty during the trial, apparently only because he was a soldier in the United States Army and wished to return to his duty station before being dropped from the rolls as a deserter (Tr. 3375; R. 248). A second defendant was acquitted by direction of the Court at the close of the Government's case.

REASONS FOR GRANTING THE WRIT

(1) Review by the Court is imperative to resolve questions of exceptional importance for the administration of criminal justice in the Federal system; to insure decisional uniformity in the review and disposition of Federal criminal conspiracy convictions by the Courts of Appeals; and to resolve a conflict among the circuits in the interpretation and application of the Court's opinions in *Kotteakos v. United States*, 328 U.S. 750 (1946) and *Berger v. United States*, 295 U.S. 78 (1935).

Risking the sort of hyperbole common to most petitions for review of Federal criminal convictions (with which the Court is perhaps justifiably unimpressed), the Petitioners are nevertheless compelled at the outset to offer three preliminary and purely gratuitous observations concerning the decision below: (i) it is plainly wrong, (ii) it is plainly inconsistent with previous decisions of this Court and other Courts of Appeals, and (iii) insofar as it impliedly sanctions the type of shotgun conspiracy prosecution undertaken in this case (and thereby indirectly encourages the Department of Justice to use it again and again in future cases), it is plainly dangerous precedent.

Admittedly the first observation does not provide by itself a particularly persuasive justification for review of these nineteen convictions. Nor, for that matter, do the other two in the event the inconsistency and the danger are not quite as clear to the Court as they are to the Petitioners. All of them, however, whatever their intrinsic validity, suggest the ultimate point of the argument: whether or not certiorari is finally granted, the very fact that *anyone* could have been prosecuted and convicted in a United States District Court in the manner revealed

by the record in this case creates a reasonable basis for legitimate concern about the continuing vitality of our constitutional traditions.

In a literal sense the present case is factually and legally indistinguishable from *Kotteakos v. United States,* 328 U.S. 750 (1946). Here, as there, the Petitioners were tried and convicted under an indictment alleging a single conspiracy among multiple defendants. Here, as there, "no connection was shown between" each defendant and all other alleged co-conspirators, and "in many cases the * * * defendants did not have any relationship with one another," 328 U.S. at 754, apart from their alleged involvement in at least one of a substantial number of individual, temporally and geographically remote criminal enterprises having some superficial similarity (e.g., they all involved dealing with stolen auotmobiles for profit) and some overlapping of participation but otherwise initiated and perpetuated separately and independently of each other for entirely unrelated objectives. Here, as there, the variance between the conspiracy charged and the conspiracies ostensibly proven had a demonstrably adverse effect on a substantial right of each defendant. "That right, in each instance, was the right not to be tried *en masse* for the conglomeration of distinct and separate offenses committed by others as shown by the record." 328 U.S. at 775.

Of course, what might constitute a fatal variance between indictment and proof in one context may be harmless error in a situation where the total number of alleged co-conspirators and proven conspiracies is relatively small, the evidence is uncomplicated, the length of trial is short, and the probable prejudicial impact of the error

on the jury's deliberations is negligible. *Berger v. United States,* 295 U.S. 78, 82-83 (1935). Nevertheless, an inconsequential mistake involving four defendants and two conspiracies in *Berger* became grounds for reversal in *Kotteakos,* where the record showed 13 defendants and eight conspiracies. "The sheer difference in numbers, both of defendants and of conspiracies proven, distinguishes the situation." 328 U.S. at 766.

In the present case there were 23 defendants on trial, all of whom had been indiscriminately lumped together in a single conspiracy indictment alleging 89 separate criminal transactions. There was no proof that all defendants participated directly or indirectly in any one of these transactions. There was not even any proof (as there was in *Kotteakos*) that a single individual participated in all transactions. Nothing whatever in the record even remotely suggests an express or tacit understanding or agreement among all defendants to traffic in stolen automobiles, to pursue a common objective through coordinated, prearranged action or to enter into a partnership in crime. The *only* factor indicating a single conspiracy was the similarity in the methods by which some of the alleged criminal enterprises were carried out—and this was precisely the circumstance unanimously held insufficient to sustain the finding of a single conspiracy in *Kotteakos.*

Moreover, exactly as in *Kotteakos,* the Trial Judge mistakenly instructed that before convicting any of the defendants the jury would first have to find the existence of a single conspiracy, rather than several separate ones. Apparently the Judge proceeded on the theory that "it was possible on the evidence for the jury to conclude that all

were in common adventure" because of "the similarity of purpose" presented by the criminal transactions. 328 U.S. at 768. "This view, specifically embodied throughout the instructions, obviously confuses the common purpose of a single enterprise with the several, though similar, purposes of numerous separate adventures of like character." 328 U.S. at 769. In the extraordinarily imposing circumstantial context of the present case, such an error cannot possibly be harmless. *Bollenbach v. United States,* 326 U.S. 607 (1946).

Suppose, hypothetically, that the Government had chosen to dismiss the conspiracy count and to proceed to trial against all defendants on 89 different substantive counts. (In view of the fact that virtually all of the "overt acts" alleged to support the conspiracy count were in themselves substantive violations of the Dyer Act, this is, in reality, precisely what happened.) In that event, because not every defendant participated in every substantive criminal transaction, it could hardly be argued successfully that all defendants might properly be joined in the same indictment and tried together under Rule 8(b) of the Federal Rules of Criminal Procedure on the theory that they "are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." *Schaffer v. United States,* 362 U.S. 511 (1960); *McElroy v. United States,* 164 U.S. 76 (1896).

Moreover, even if it were somehow posible to justify a conglomerate trial of 89 different substantive offenses under appropriate cautionary instructions to the jury, *Schaffer v. United States, supra; Delli Paoli v. United*

States, 352 U.S. 232 (1957), the obvious answer as regards the present situation is that no such instructions were given. On the contrary, as established by the Petitioners' statement of the case, the instructions actually given by the Trial Judge on the "one and only one" conspiracy theory were substantively incorrect and manifestly prejudicial under the reasoning in *Kotteakos*.

Suppose, again hypothetically, that two large automobile theft rings are operating simultaneously but independently within the United States, one in the northeast part of the country and one in the southwest, and that none of the participants in either ring have the slightest knowledge of the existence or activities of those in the other. Suppose further that the ringleaders of each aggregation meet fortuitously in Minnesota during vacations from their car-stealing activities and, suddenly craving the drama and excitement of their usual occupations, decide on the spur of the moment that one will steal an automobile in downtown Minneapolis and deliver it to the other at a predetermined location in Iowa. Finally, suppose that in undertaking this enterprise both ringleaders are operating as free agents and have not even bothered to inform the boys back home of this particular interstate theft.

Under the theory advanced by the Government, adopted by the Trial Judge and ratified by the Court of Appeals, all members of both theft rings have conspired to violate the Dyer Act simply by virtue of their association with their respective ringleaders. All members may be indicted and tried together for a single conspiracy; all criminal transactions previously undertaken by either group in

its own part of the country are admissible against the other group for the purpose of establishing the existence of that single conspiracy, and the jury may be instructed that it should find only one conspiracy, rather than two separate ones, in assessing the guilt or innocence of each defendant.

Such a situation clearly illustrates the classic theory of conspiracy by association condemned by *Kotteakos v. United States*. But it is more than a mere example; if the states of Kentucky and Indiana are substituted for Minnesota and Iowa, that hypothetical reflects the essence of the record in this case. More than a single transaction was alleged, more than two conspiracies were shown, and the facts were infinitely more complex—but the principle is precisely the same.

Apparently, however, the Court of Appeals was persuaded that the sheer number of criminal transactions shown and their extensive temporal and geographical scope, coupled with the overlap of individual participation in some instances, justified and supported the conclusion that only a gigantic single conspiracy was established, rather than a number of more diminutive ones. (This may properly be characterized as the smoke-fire theory of criminal conspiracy.) Moreover, that Court was willing not only to approve the Trial Court's instructions but to affirmatively endorse them as well because the Judge apprised the jury on many occasions "that guilt or innocence must be determined on an individual basis for each defendant." (The utility of such an instruction in cases such as this is somewhat questionable in light of the established proposition, employed later in the Court's opinion to affirm the convictions of those individuals perched pre-

cariously on the outer fringes of involvement, that "once a conspiracy has been established, only slight evidence is necessary to connect a defendant with it.")

The problem with this approach is that it is diametrically opposed to the reasoning underlying *Kotteakos v. United States.*

First, the proclivity toward finding a single conspiracy simply or for the most part on the basis of evidence that very great numbers of individuals have participated in very great numbers of criminal transactions is diametrically opposed to the *Kotteakos* philosophy. *Kotteakos* teaches that numbers are of evidentiary significance, not to establish the propriety of a single conspiracy indictment, but to establish its *impropriety:*

> "Numbers are vitally important in trial, especially in criminal matters. Guilt with us remains individual and personal, even as respects conspiracies. It is not a matter of mass application. There are times when of necessity, because of the nature and scope of the particular federation, large numbers of persons taking part must be tried together or perhaps not at all, at any rate as respects some. When many conspire, they invite mass trial by their conduct. Even so, the proceedings are exceptional to our tradition and call for use of every safeguard to individualize each defendant in his relation to the mass. *Wholly different is it with those who join together with only a few, though many others may be doing the same and though some of them may line up with more than one group.*
>
> "Criminal they may be, but it is not the criminality of mass conspiracy. They do not invite mass trial by their conduct. Nor does our system tolerate it.

That way lies the drift toward totalitarian institutions. True, this may be inconvenience for prosecution. But our Government is not one of mere convenience or efficiency.[12] It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal trials. About them we dare not become careless or complacent when that fashion has become rampant over the earth" (emphasis added). 328 U.S. at 772-73.

* * *

"[T]he conspiracy offense is perhaps not greatly different from others *when the scheme charged is tight and the numbers involved small.* But as it is broadened to include more and more, in varying degrees of attachment to the confederation, the possibilities of miscarriage of justice to particular individuals become greater and greater. * * * At the outskirts they are perhaps higher than in any other form of criminal trial our system affords. The greater looseness generally allowed for specifying the offense and its details, for receiving proof, and generally in the conduct of the trial, becomes magnified *as the numbers involved increase.* Here, if anywhere, * * * extraordinary precaution is required, not only that instructions shall not mislead, but that they shall scrupulously safeguard each defendant individually, as far as posible, from loss of identity in the mass" (emphasis added). 328 U.S. at 776.

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12. As one of the justifications for its position at trial that all defendants should be tried together for a single conspiracy, the Government asserted that "it would be an undue burden upon the United States to be required to prove the conspiracy more than once" (Mtn. Tr. 127).

Apparently little if any thought was given by the Government to the burden placed on the defendants.

Secondly, the Court of Appeals' approval of the instructions given in this case apparently rests on the misconception that it was only necessary for the jury to be instructed to consider carefully the question of individual guilt in relation to a *single* conspiracy in order to avert "loss of individual identity and consequent guilt by association." "But this obviously does not, and could not, *go to keeping distinct conspiracies distinct,* in view of the court's conception of the case." *Kotteakos v. United States,* 328 U.S. at 669-70 (emphasis added).

Although the Sixth Circuit's inversion and misapplication of the *Kotteakos* standards have apparently become established doctrine in both the Second and Fifth Circuits, *United States v. Borelli,* 336 F.2d 376, 383-87 (2 Cir., 1964); *United States v. Perez,* 489 F.2d 51, 60-61 (5 Cir., 1973), the same error has not yet infected the Fourth, Seventh and Ninth. Each of these circuits has consistently refused, citing *Kotteakos,* to affirm multiple Federal convictions for a single criminal conspiracy where the evidence establishes more than one. . .; *United States v. Goss,* 329 F.2d 180, 183-84 (4 Cir., 1964); *United States v. Varelli,* 407 F.2d 735, 742-48 (7 Cir., 1969); *Barnard v. United States,* 342 F.2d 309, 313 (9 Cir., 1965); *Rocha v. United States,* 288 F.2d 545, 552-53 (9 Cir., 1961).

Even a casual reading of the opinions in these cases demonstrates that, had the Petitioners' convictions been appealed to the Courts of Appeals for the Second or Fifth Circuits, they would have been affirmed. Had they been appealed to the Fourth, Seventh or Ninth Circuits, they would have been reversed.

Without indulging in unwarranted cynicism, and without in the slightest degree impugning the intellectual integrity or judicial character of those distinguished Circuit Judges who appear to have departed from the Court's holding in *Kotteakos*, the Petitioners respectfully suggest that the most obvious explanation for this divergence of approach and application in the Courts of Appeals is the understandable reluctance and perhaps subconscious resistance of any Judge to render a decision that has the effect of overturning at one time a very large number of criminal convictions involving individuals who, while perhaps not guilty of the offenses for which they were indicted, tried and convicted, are nevertheless probably guilty of some other, perhaps equally serious, crimes. "There is, of course, strong temptation to relax rigid standards [governing appellate review of conspiracy cases] when it seems the only way to sustain convictions of evildoers. But statutes authorize prosecution for substantive crimes for most evildoing without the dangers to the liberty of the individual and the integrity of the judicial process that are inherent in conspiracy charges." *Krulewitch v. United States*, 336 U.S. 440, 457 (1949) (concurring opinion by Mr. Justice Jackson).

In any event, from what has been said before, it is clear that the checkered career of *Kotteakos v. United States* in the Courts of Appeals manifests the classic sort of inter-circuit conflict that has traditionally been regarded by the Court as appropriate for resolution through the exercise of its certiorari jurisdiction. If for no other reasons, the Petitioners respectfully suggest that review should be granted.

(2) The opinion of the Court of Appeals leaves untouched the substantial and recurring problems of due process created by the procedurally oppressive Federal criminal conspiracy prosecution. The Court should accept the opportunity presented by this case to confront and resolve those problems.

More than a quarter of a century ago the late Mr. Justice Jackson, in what has become perhaps his most often-quoted statement on the subject, declared that "the unavailing protests of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition thereto, suggests that loose practice as to this offense constitutes a serious threat to fairness in our administration of justice." *Krulewitch v. United States,* 336 U.S. at 445-46 (concurring opinion). Since that time the protests have continued periodically, but largely to no avail.

The conspiracy prosecution is the atomic bomb in the legal arsenal of every Federal prosecutor. Its tremendous potential for destruction of organized criminal activity has made it an indispensible vehicle for effective law enforcement. Not for an instant do the Petitioners suggest that the Court should seriously consider defusing it altogether. But that destructive force, when abused or misdirected, threatens not only the constitutional rights of the individuals subjected to it but the very integrity of the judicial process itself. In this case the explosion has virtually obliterated the Petitioners' right to due process of law.

Of course, almost every conspiracy prosecution entails, from the accused's perspective, greater hazards and procedural rigors than the trial of an ordinary substantive offense. There are likely to be a multitude of co-defend-

ants. Because such cases often involve exceptionally complex evidentiary issues, the trial itself is likely to be extraordinarily lengthy. Given the co-conspirator exception to the hearsay rule and the danger of being lumped together with great numbers of other individuals as alleged co-conspirators, the practical ability to defend effectively against allegations of criminal misconduct is necessarily diminished and the potential for inadvertent conviction of the innocent correspondingly increased. This is particularly true when the conspiracy charge finds its ultimate source (as is the case with alarming frequency) in the uncorroborated accusations of fundamentally disreputable individuals who agree to testify for the Government as unindicted co-conspirators, at least in part to diminish the punitive consequences of their own criminality.

Despite these wholly undesirable consequences, the history of Federal conspiracy law long ago weighed individual and governmental interests in the balance and found, all things considered, that the advantages to the prosecution outweigh the disadvantages to the defense. The Petitioners do not now argue against that historical judgment.

They do contend, however, that there is a significant and fundamental constitutional distinction to be drawn, if not in principle at least in degree, between the "ordinary" conspiracy prosecution, with its attendant procedural rigors to which the defendant can only become philosophically resigned, and the "extraordinary" conspiracy case in which the character and extent of the Government's imposition upon the defendant becomes both practically intolerable and a denial of due process of law. This case is extraordinary.

Only one vivid example is needed to illustrate this point. In affirming the conviction of Petitioner Fred Tabor as a co-conspirator, the Court below concluded that the evidence was sufficient because "Bayer [a Government witness] * * * testified that he delivered a check to Tabor in addition to whatever amount [Tabor] ultimately received from the automobile insurance." This assessment of the record was mistaken. There was no evidence whatever that Bayer had ever delivered or caused to be delivered a check to Tabor; quite the contrary, Bayer testified positively and unequivocally that he had delivered two checks representing the proceeds from the sale of Tabor's automobile to another alleged co-conspirator, Basham (Tr. 3306-07). Indeed, Bayer also testified that he had never even talked to Tabor (Tr. 1637).

Ordinarily such a discrepancy might be dismissed as a trivial oversight, but not in this case. Three Federal Judges, having before them the complete 9,000-page transcript of an eight-week trial; having available an extended period of time in which to read it; and having the professional expertise to evaluate the legal significance of the evidence revealed by that transcript in relation to the issues under review, nevertheless inadvertently based their decision to affirm a Federal criminal conspiracy conviction on a view of the evidence that was, from any conceivable perspective, flatly incorrect.

Without any of the resources available to the Judges of the Court of Appeals, the jury was asked to do something that those Judges could not do: to accurately determine the nature of the evidence that was presented by the Government during the trial; to evaluate that evidence, and to reach some reasonably reliable conclusion as to guilt or innocence on the basis of that evidence. Under

the totality of circumstances, all findings of guilt that resulted are virtually worthless.

In related contexts the Court has invariably rejected those criminal procedures that substantially impair the "integrity of the fact-finding process." *Berger v. California*, 393 U.S. 314, 315 (1969); *Dutton v. Evans*, 400 U.S. 74, 89 (1970); *Bruton v. United States*, 391 U.S. 123, 135-37 (1968); *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). This is no idle or empty phrase. It expresses a principle of fundamental constitutional significance that lies at the very heart of our adversary system of criminal justice: individuals are not subject to conviction and punishment if the procedural mechanisms leading to the determination of their guilt are inherently unreliable. If that is truly the ultimate test of due process of law, the verdicts against these Petitioners cannot stand.

The extraordinary departure from minimal conceptions of a fair trial revealed by this record is deserving of plenary review by the Court—hopefully in order to insure that it will not happen again in some future conspiracy prosecution.

CONCLUSION

For all of the foregoing reasons the Petitioners respectfully suggest that their petition for the writ of certiorari should be granted.

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APPENDIX "A"

NOS. 73-1988 and 1989
NOS. 73-1990, 1991 and 1992

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

On Appeal From The United States District Court
For The Western District Of Kentucky

NO. 73-1988

United States of America, *Plaintiff-Appellee,*

v.

Billy Mayes, William Albert Hudson, Shirley Basham, Fred Tabor, Jimmy Thompson, Hubert Harrison, William Houk, Nathan McDaniel, Larry Gann, Larry Suddeth, James Dennison, James Hendricks, Carroll Rey Pemberton, Lewis H. Bewley and Larry Osborn, *Defendants-Appellants.*

NO. 73-1989

United States of America, *Plaintiff-Appellee,*

v.

L. C. Cook, *Defendant-Appellant.*

NO. 73-1990

United States of America, *Plaintiff-Appellee,*

v.

Ernest Frank Fowler, *Defendant-Appellant.*

A-2

NO. 73-1991

United States of America, *Plaintiff-Appellee,*

v.

Chester Crawley, *Defendant-Appellant.*

NO. 73-1992

United States of America, *Plaintiff-Appellee,*

v.

James Donald Newberry, *Defendant-Appellant.*

Decided and Filed February 25, 1975

Before: Phillips, Chief Judge, Lively and Engel, Circuit Judges.

Engel, Circuit Judge. In this case, nineteen defendants appeal from judgments entered upon a jury verdict, in which they were found guilty of violating the federal criminal conspiracy statute, 18 U.S.C. § 371.[1] Their appeals raise a number of issues, including whether the government proved a single conspiracy, the sufficiency

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1. 18 U.S.C. § 371 provides:

§ 371. Conspiracy to commit offenses or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

of the evidence as to certain defendants, the propriety of the judge's jury instructions, peremptory challenge of jurors, severance, double jeopardy. and right of confrontation.

On August 15, 1972, a grand jury empanneled in the United States District Court for the Western District of Kentucky, returned an indictment, count one of which charged 28 persons with conspiracy to violate the Dyer Act (18 U.S.C. §§ 2312, 2313[2]). The indictment charged that the named defendants and thirteen others (named but unindicted) conspired to transport, receive, conceal, store, barter, sell and dispose of stolen motor vehicles, moving in interstate commerce. The multi-state stolen car operation was alleged to have been based in Kentucky, and to have involved activities in a total of at least ten states including Tennessee, Indiana, Ohio, Alabama, North Carolina, Arkansas, Georgia, Missouri, and Mississippi. The thirty-seven page indictment generally outlined the elements of the alleged illegal arrangement, and included in its original form a list of seventy-one overt acts allegedly taken in furtherance of the conspiracy.

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2. 18 U.S.C. §2312 provides:

§ 2312. Transportation of stolen vehicles

Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 806.

18 U.S.C. § 2313 provides:

§ 2313. Sale or receipt of stolen vehicles

Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 806.

The remaining counts of the 25-count indictment charged individual defendants with substantive violations of the Dyer Act. Those counts were not tried below and are not a part of this appeal.

On April 2, 1973, twenty-four of the named defendants came on for trial to a jury. One of the defendants, William Belvy Barbee, pled guilty during the trial, and another, Charlotte Mayes, was acquitted by direction of the trial judge at the conclusion of the government's proofs. On May 23, 1973, after eight weeks of trial, and consideration of the testimony of several hundred witnesses, the jury returned a verdict acquitting defendants Billy D. Miller, Charles Adams and Ronald Kinsey, and finding the remaining nineteen defendants guilty as charged, They appeal.

In our review of a case involving so many individuals claimed to have participated in so many incidents covering a broad geographical area, it has been particularly necessary to examine the trial as a whole for any errors which might affect the fairness of the entire proceedings. Similarly, it has been necesary to examine closely the specific evidence which is claimed to support the conviction of each individual defendant. Thus, our review has included a complete examination of more than 9,000 pages of transcript, keeping in mind the admonition of Justice Rutledge in *Kotteakos v. United States,* 328 U.S. 750, 772 (1946):

> "Guilt with us remains individual and personal, even as respects conspiracies. It is not a matter of mass application. There are times when of necessity, because of the nature and scope of the particular federation, large numbers of persons taking part must be tried together or perhaps not at all, at any rate as respects some. When many conspire, they invite mass trial by their conduct. Even so, the proceedings are exceptional to our tradition and call for use of every safeguard to individualize each defendant in his relation to the mass."

THE CONSPIRACY

The government alleged that the named defendants were all a part of a conspiracy wherein certain co-conspirators would either steal or cause to be stolen automobiles in the ten-state area.[3] In certain instances wrecked automobiles or parts thereof were purchased, the registration papers and other indicia of vehicle identification so obtained being then transferred to the similar stolen autos. The original identification of the stolen autos would then be destroyed or altered so as to provide a completely new and apparently legitimate identity to the stolen vehicles. In addition to such alteration and substitution, the conspiracy involved a complicated scheme to obtain false motor vehicle registration certificates and bills of sale.

The success of the conspiracy was largely due to the participants' ability to sell stolen cars which appeared, on all but the closest examination, to have been ligitimately acquired and registered. Thus, the papers of a wrecked automobile as well as the forged papers purportedly issued elsewhere were presented to a county clerk to obtain new and seemingly valid papers matching the numbers and description of the stolen vehicle. This was made possible by the decentralized nature of the Kentucky registration system, whereby registrations were issued out of each of some 35 different county clerks' offices. By constantly moving from county seat to county seat and appearing at rush hours, the possibility of detection was minimized. Further laundering was accomplished by having the newly created vehicle subjected to a vehicle safety inspection

3. Because of the factual complexity of the case, what follows is intended to be more illustrative than all-encompassing in spelling out the nature of the operation. In many facets, the circumstances here are similar to those reported in *United States v. Goble, et. al.*, No. 73-1764-7 (6th Cir. decided and filed _____, 1975).

usually at the automobile agency of acquitted defendant Billy D. Miller, thus providing additional evidence of legitimate identification.

Evidence at the trial indicated that as many as 1800 stolen automobiles may have been involved during the period of the claimed conspiracy. Most proof at trial was confined to evidence of the overt acts included in the indictment, originally seventy-one, but later reduced to sixty-five.

Evidence as to each overt act generally included the testimony of the original owner, testimony regarding the particulars of the theft, followed by testimony by the ultimate and usually innocent purchaser of the stolen and altered vehicle. The chain of evidence of ownership was carefully presented through presentation of the certificates filed with the county clerks, and was then shown to be authentic or forged. Evidence was introduced, as to forged vehicles, showing that the serial number assigned was issued to the owner of a completely different automobile.

In this manner, the government took the jury step-by-step through the maze of facts which were to prove the overt acts and the existence of a conspiracy.

ISSUES ON APPEAL

While all nineteen appellants were tried together, four separate appeals were docketed, reflecting appellants' representation by four separate counsel or groups of counsel. To avoid repetition, while assuring careful attention to the claims of each individual, we have reorganized the issues and will treat, first, those of a general nature which could, if meritorious, affect the right of all defendants. We shall

then proceed to those issues which are claimed to affect particular defendants.

I. COMMON ISSUES

A. Was more than one conspiracy shown?

It is claimed that the government failed to prove the existence of a single conspiracy of which all of the defendants were a part, but in fact proved two or more conspiracies, in consequence denying the defendants' right "not to be tried en masse for the conglomeration of distinct and separate offenses committed by others". *Kotteakos v. United States, supra,* at p. 775.

While we treat later in this opinion the question of the sufficiency of the evidence to connect each defendant with the conspiracy alleged, we conclude that the existence of a single conspiracy was in fact proved.

The government established the formation of a central organization, masterminded by such individuals as Billy Mayes, Shirley Basham and William Albert Hudson. It further proved that these leaders secured the services of car thieves, such as co-conspirator James Cecil Wilson, defendant William Henry Wilson, co-conspirator Claude Dillon and others. The interstate transportation of the cars, the forging and alteration of identification, and the fencing of the cars were proved. These activities were shown to involve both the unindicted co-conspirators and the defendants.

While the government did not prove that each defendant knew or was involved with all of the activities of all other defendants, this is not an essential element of proving a single conspiracy. *United States v. Levinson,* 405

F.2d 971 (6th Cir. 1968). Indeed in any large organization, legal or illegal, it is common for willing participants not to be acquainted with all of the members of the organization, or even to know the nature of every aspect of the operation. Nor does the fact that the conspiracy continued over a long period of time and contemplated the commission of many illegal acts transform the single conspiracy into several conspiracies. *Braverman v. United States*, 317 U.S. 49 (1942); *United States v. Goble, et al.*, No. 73-1764-67 (6th Cir. decided and filed _____, 1975). A conspiracy is completed when the intended purpose of the conspiracy is accomplished. But where a conspiracy contemplates a continuity of purpose and a continued performance of acts, it is presumed to exist until there has been an affirmative showing that it has terminated and its members continue to be conspirators until there has been an affirmative showing that they have withdrawn. *United States v. Ethridge*, 424 F.2d 951, 964 (6th Cir. 1970).

Appellants here, however, do not claim that the conspiracy ended and another began. They assert the existence of more than one conspiracy existing at the same time, arguing that the government has attempted to tack together several 'parallel' conspiracies. Viewing the evidence in the light most favorable to the government, *Ethridge, supra*, we conclude that the government succeeded in showing that the many acts occurring over a long period of time and involving many people were all a part of a single conspiracy. The conspiracy shown was quite long lived and very successful until it was detected. It spread over a large geographical area. It appears that because of the very success and widespread nature of the organization, defendants now claim that it was not one unified

undertaking, but a series of disjointed and separate activities which might have enjoyed some commonality, but which lacked the essential continuity and singleness of purpose necessary to prove one conspiracy. We cannot agree. *United States v. Goble, supra.*

While not passing at this point upon the question of whether each of the named appellants was in fact a part of the conspiracy, we conclude, upon an examination of the entire record, that the evidence supported a conclusion by the jury that one continuous conspiracy was proved.

B. The Jury Instruction Generally

Common to all appeals here is the claim that the trial court's charge to the jury was, as described by one appellant, "so vague and nonspecific as to leave the battered and confused minds of the laymen who composed the jury in a state of confusion as to what they were to determine" and "lacked sufficient clarity and precision to enable the jury to perform its function of finding the relevant facts and applying law to them". It was further claimed that the instructions, which covered 113 pages of transcript, failed to protect the right of each defendant to an individual examination by the jury of his guilt or innocence. Finally, it was claimed that they did not make sufficiently clear that the defendants were on trial for conspiracy and not for any substantive offenses shown to have been committed by proof offered in support of the overt acts alleged.

The instructions were indeed long. They were repetitious, probably intentionally so, to impress upon the minds of the jury the importance of certain principles of law. The instructions were delivered in a colloquial fashion by an experienced judge who took pains to employ the

"common speech of man". *Downie, et al. v. Powers,* 193 F.2d 760, 767 (10th Cir. 1951). The trial judge frequently employed the technique of explanation by way of illustration and example to heighten the meaning of difficult legal concepts.

Contrary to the assertion of the appellants, the court did emphasize that the charge was conspiracy and not auto theft:

> "This is not a charge of stealing automobiles; it's a charge that a conspiracy existed for the purpose of stealing them and transporting them in interstate commerce."

The trial judge also properly instructed the jury more than once that a conspiracy must first be proved before the jury could consider which, if any, of the defendants were a part of it. We also find that the trial judge was particularly sensitive to the danger of loss of individual identity and consequent guilt by association. He instructed the jury numerous times that guilt or innocence must be determined on an individual basis for each defendant. He instructed the jury on the law of conspiracy not only with technical accuracy, but as well followed the advice of Lord Bacon "you should be a light to open their eyes, but not a guide to lead them by the noses."[4]

While the danger of confusion is indeed present in any case of this magnitude, we were impressed by the overall lucidity, balance and fairness of the trial judge's charge here. This charge was clearly not ambiguous and confusing to the point of plain error. Cf. *Bollenbach v. United States,* 326 U.S. 607 (1946).

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4. Quoted by Judge Soper in The Charge to the Jury, 1 F.R.P. 540, 545 (1940).

C. Peremptory Challenges

Under Rule 24(b) of the Federal Rules of Criminal Procedure, a defendant or defendants are entitled to a total of ten peremptory challenges. It is further provided that "If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly".

Here, the trial judge allowed a total of twenty-four peremptory challenges to be exercised by the twenty-four defendants. Defendants-appellants urge that the trial judge abused his discretion in the manner in which he permitted the challenges to be exercised. The claims of the several groups of counsel on appeal are somewhat inconsistent. Counsel for defendant Billy Mayes and several others complains that the trial judge erred in requiring "that all attorneys for defense agree to the exercise of each of the twenty-four peremptory challenges granted to the defendant". On the other hand, counsel representing only one defendant, such as the attorneys of Ernest Frank Fowler and L. C. Cook felt themselves unfairly limited to a single peremptory strike.

The record reflects that the method employed in the exercise of the peremptory challenges was somewhat informal. Most challenges were exercised separately following a conference of the counsel. When the number of challenges remaining was reduced to three, difficulty did develop which was resolved by a mutual agreement to exercise those remaining in a joint manner.

In the selection of jurors, the district court is accorded a wide latitude of discretion. As Professor Wright has observed:

> "It is well established that the federal court is not bound to the particular method of selecting a jury that is required by state law, and where the subject is not controlled by statute, the order in which peremptory challenges shall be exercised is in the discretion of the court. The rules do not prescribe any particular method of exercising peremptory challenges, and the practice varies widely from district to district, regulated only by local rule or custom." 2 Wright, Federal Practice and Procedure: Criminal § 387

We find that the trial judge did not abuse his discretion in the application of Rule 24(b) in this case.

D. The Separate Trial Issue; Loss of the Right to Control One's Defense.

Throughout these appeals, it is contended that the court should have granted the several pretrial motions for severance made by the defendants. Appellants claim that because they were required to be tried en masse, they were prejudiced by evidence relating to some defendants and not to others, they were deprived of the right to control their own defense, and they were unduly burdened by the length and expense of the trial. Specifically, defendants Newberry and Crawley objected to testimony elicited by counsel for certain other defendants which implied that a threat and a demand for money had been conveyed to the defendant William Hudson by counsel for Max Bayer, an unindicted co-conspirator. Similarly, several defendants complain that they were prejudiced by the appearance of one Joseph Goldman who, when called by other defendants, was completely discredited as a witness in front of the jury.

Defendants Fowler and Cook complain primarily that their own alleged involvement in the conspiracy was at best peripheral and the proof relevant thereto could have been presented in a very short time. Thus, they claim, to have involved them in a trial of this length was an unfair and onerous burden upon their time and resources, subjecting them to the dangers pointed out in *Kotteakos v. United States, supra*:

> "But as it [the conspiracy] is broadened to include more and more, in varying degrees of attachment to the confederation, the possibilities for miscarriage of justice to particular individuals become greater and greater . . . At the outskirts they are perhaps higher than in any other form of criminal trial our system affords." 328 U.S. at 776

The decision of whether to grant a severance to co-defendants lies within the sound discretion of the trial court, *Opper v. United States,* 348 U.S. 84 (1954); *United States v. Goble, supra.* See also *Metcalf v. United States,* 195 F.2d 213 (6th Cir. 1952); *Poliafico v. United States,* 237 F.2d 97 (6th Cir. 1956). We note that the trial court did sever the conspiracy trial from the substantive auto theft charges as to all defendants. Thus these defendants fared better than those in *Poliafico, supra,* wherein eighteen defendants went to trial on both conspiracy and substantive counts.

Moreover, we are not persuaded that these defendants were prejudiced by the joint trial. The testimony to which Crawley and Newberry objected was impeachment testimony which backfired, but it was not inadmissible and its impact was reduced by the disavowals of their counsel at the time. Likewise, some of the individual defendants

urge that severance of their trials would have spared them the expense and inconvenience of the longer trial. While this practical consideration merits our careful attention, it assumes that the prosecution was entitled to prove only the actual involvement of each defendant charged, and not the scope of the entire conspiracy. Whether the trials were joint or separate, the government could prove the entire scope of the conspiracy, though one defendant's role in it was limited. We find no error in the refusal of the trial judge to grant any of the motions for a severance.[5]

II. SUFFICIENCY OF EVIDENCE

A number of defendants claim that even if the government has proved the conspiracy, evidence of their participation in it was insufficient to sustain conviction. While we have already held that the jury could properly have found the existence of a single conspiracy here, this of course does not dispose of the issue of sufficiency as to each defendant convicted. *Kotteakos, supra.* In reviewing for sufficiency of the evidence, we view the evidence in the light most favorable to the government. *Glasser v. United States,* 315 U.S. 60 (1942).

A. Houk, Basham and Hudson.

William Houk claims that the evidence showed him to be no more than a supplier of stolen automobiles and failed to demonstrate any knowledge of the conspiracy

5. One additional claim is raised as a common issue. Certain defendants claim that the trial judge should have permitted them to testify and to call other defendants to testify about certain aspects of the conspiracy, without waiver of their Fifth Amendment right not to respond to questions about the car thefts which were also the subject of the separate substantive counts of the indictment. On the record before us, we find this contention to be without merit.

on his part. Shirley Basham and William Albert Hudson claim that their sole connection with the other defendants was limited to the occasional use of a common outlet for automobiles. We find it unnecessary to discuss in depth the issue of these three defendants' involvement in the conspiracy. Our careful review of the record completely satisfies us that their involvement in the conspiracy was amply supported by the proof in this case.

B. Tabor, Bewley and Cook.

The involvement of defendants Fred Tabor, Lewis H. Bewley, and L. C. Cook was less extensive and has merited close scrutiny. We conclude, however, that under applicable law the extent of their involvement was sufficient for the jury to have found them to be a part of the conspiracy.

Fred Tabor: It is contended that there was no evidence of any direct involvement on stolen car activity on the part of Fred Tabor, nor any evidence linking him to the conspiracy. The evidence showed that Tabor arranged with Max Bayer and Shirley Basham to have Tabor's car stolen. The proofs showed that Tabor drove his 1970 Buick Electra to a basketball game in Dayton, Ohio, where it was parked outside the arena and "stolen". Unindicted co-conspirator Max Bayer testified that it was planned that Tabor would then file an insurance claim, and that he would also receive some money from the others after the car was disposed of. Bayer also testified that Tabor was part of a scheme whereby it was arranged that in advance of the "theft", Basham would obtain a set of Tabor's keys, and a changeover of the serial number and license plates to Bayer's name would take place.

The evidence showed that Bayer and Basham were both deeply involved in the conspiracy charged in this case. While the means by which Tabor's automobile was acquired could be characterized as fraud rather than theft, in all other respects its handling and processing through the car theft ring matched procedures generally used by the ring for stolen automobiles. It was intended to and did produce the same result for the conspirators. Bayer further testified that he delivered a check to Tabor in addition to whatever amount he ultimately received from the automobile insurance.

Lewis H. Bewley: The evidence established that Bewley had been in possession of a stolen 1970 Volkswagen, which was fully identified as having been processed through the conspiracy after having been stolen in Indianapolis. The proofs further showed that while processing the vehicle in the summer of 1970, Bewley had a conversation with a neighbor, Marine Captain William R. Higgins, in which the 1970 yellow Volkswagen was discussed. Higgins testified that Bewley said he had purchased the car in the Bowling Green area. Higgins also testified:

> "He did not use the term stolen. He used the term hot and the term warm . . . that it could have come from Indianapolis."

He further testified that Bewley mentioned the

> "fact that it was legally registered and I believe the term if it was warm, I don't have to worry because I do have a legal registration to the vehicle."

Higgins further quoted Bewley as mentioning that other Volkswagens were available to buy and that the "vehicle

could not be serviced at a VW dealer and that, of course, the guarantee was not good on the vehicle." Captain Higgins reported this incident to the Louisville Police which resulted in Bewley's arrest and indictment. The evidence revealed that upon his arrest, Bewley gave what proved to be a false story of how he had acquired the car.

The evidence revealed that Bewley's 1970 Volkswagen had been stolen in Indianapolis and was processed in much the same manner as the other vehicles proved to be involved in the conspiracy, and that the bill of sale evidencing Bewley's purchase of the vehicle had been forged. The evidence was sufficient to support a jury finding that Bewley knew of the existence of the conspiracy and its goals when he knowingly purchased the stolen vehicle.

L. C. Cook: Cook contends that he was nothing more than a customer of the conspiracy and not a member of it.

In his brief on appeal, Cook concedes:

"The government showed that the 1969 Chevrolet pickup truck listed in overt act number 10 in the indictment was stolen in Monrovia, Indiana in January, 1970. The truck came into L. C. Cook's possession on July 22, 1970, by Cook's admission and it was found in his possession in Louisville, with a new motor and some alteration of a serial number plate, on November 4, 1970." He further acknowledges that unindicted co-conspirator Max Bayer testified to having seen Cook on an unspecified date at a restaurant in Bowling Green, and that in Cook's presence Bayer, Shirley Basham, and Willie Hudson discussed stolen vehicles, including a pickup truck. Cook concedes that "the jury could infer . . . that Cook knew the co-defendants Basham and Hudson and knew they

dealt in stolen vehicles", and that "L. C. Cook knowingly purchased the car and services of Billy Mayes and his associates".

Discussion: It has been held that once a conspiracy has been established, only slight evidence is necessary to connect a defendant with it. *United States v. Chambers,* 382 F.2d 910 (6th Cir. 1967); *Poliafico, supra.* We conclude that there was sufficient evidence to support a jury determination that, beyond a reasonable doubt, these three defendants were connected with the conspiracy.

That defendant Tabor's specific conduct involved fraud instead of theft does not mean that he could not be a part of the conspiracy. It is sufficient if his actions were taken with a knowledge of the conspiracy and its purpose, *United States v. Chambers,* supra, and that they were taken with a view toward furtherance of the "common design or purpose" of the conspiracy. *United States v. Bostic,* 480 F.2d 965, 968 (6th Cir. 1973). Defendant Tabor did not merely participate in a single act of insurance fraud. By committing his car to the conspirators for compensation in addition to any insurance he might recover, he acquired a "stake" in the "outcome". *United States v. Falcone,* 311 U.S. 205 (1940). Thus, he acted to further the conspiracy.

Both Bewley and Cook were shown to have knowingly purchased stolen vehicles from members of the conspiracy with knowledge of the conspiracy and its purposes. Indeed, Cook concedes this much. They claim that they were customers only, acting in their own individual interests, and cannot be held as conspirators. In *United States v. Ford,* 324 F.2d 950, 952 (7th Cir. 1963), it was held that:

> "The relationship of buyer and seller absent any prior or contemporaneous understanding beyond the mere sales agreement does not prove a conspiracy to sell, receive, barter or dispose of stolen property although both parties know of the stolen character of the goods. In such circumstance, the buyer's purpose is to buy; the seller's purpose is to sell. There is no joint objective."

The Supreme Court has also held that "one does not become a party to a conspiracy by aiding and abetting it, through sales of supplies or otherwise *unless he knows of the conspiracy;* and the inference of such knowledge cannot be drawn merely from the knowledge that the buyer will use the goods illegally." *Direct Sales v. United States,* 319 U.S. 703, 709 (1943), interpreting its previous decision in *Falcone v. United States,* 311 U.S. 205 (1940) (emphasis added).

There was proof these defendants had a "prior or contemporaneous understanding of the conspiracy beyond the mere sales agreement". *United States v. Ford, supra,* at 952. Moreover, their knowledge of the conspiracy need not be inferred from mere knowledge of illegality (the stolen nature of the vehicles). *Direct Sales, supra.* L. C. Cook's presence at a meeting of three of the leading co-conspirators when "stolen vehicles" were discussed, *prior* to his purchase, was a sufficient basis for a finding that he knew of the conspiracy and not simply that the truck he purchased was stolen. As to Bewley, testimony established that he knew far more than merely that his Volkswagen possessed a questionable pedigree. His conversation with Captain Higgins revealed that he appeared fully aware of the salient features of the conspiracy itself.

We conclude that there was evidence from which the jury could find that all three of these defendants knew of

the existence and purposes of the Bowling Green conspiracy at the time of their alleged involvement. They benefited from it and they contributed to its success. This is sufficient.

III. ISSUES AFFECTING INDIVIDUAL DEFENDANTS

A. Ernest Frank Fowler:[6] Right of confrontation

Appellant Ernest Frank Fowler claims that his Sixth Amendment right of confrontation was denied by the persistent and leading questions put by the government attorney to three witnesses, notwithstanding the assertion of their Fifth Amendment privilege against self-incrimination.

In *Douglas v. Alabama,* 380 U.S. 415 (1965), an alleged accomplice of the defendant, one Loyd, invoked his Fifth Amendment privilege when called by the government. Under the guise of cross-examining a hostile witness, the prosecutor, over objection, read in the presence of the jury the accomplice's purported confession which implicated the defendant on trial. Three law enforcement officers then identified the document as a confession which was signed by the accomplice. The result of this prosecutorial misconduct, held the Supreme Court, was to deprive the defendant of his Sixth Amendment right to confrontation:

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6. Fowler also raises an issue regarding polygraph evidence which we hold to be without merit. The trial judge clearly acted within his discretion in refusing Fowler's requests regarding polygraph examinations and evidence. See *United States v. Stifel,* 433 F.2d 431 (6th Cir. 1970); *United States v. Franks, et al.,* No. 73-2157-2160, 74-1138 (6th Cir. decided and filed _____, 1975).

> " . . . effective confrontation of Loyd was possible only if Loyd affirmed the statement as his. However, Loyd affirmed the statement as his. However, Loyd did not do so, but relied on his privilege to refuse to answer. We need not decide whether Loyd properly invoked the privilege in light of his conviction. It is sufficient for the purposes of deciding petitioner's claim under the Confrontation Clause that no suggestion is made that Loyd's refusal to answer was procured by the petitioner, see *Motes v. United States,* supra [178 U.S. 458] at 471; on this record it appears that Loyd was acting entirely on his own interests in doing so." *Douglas v. Alabama, supra,* at p. 420

The three witnesses involved here were Pruitt and Arnold Fowler, brothers of defendant Ernest Frank Fowler, and Terry Fowler, son of Pruitt Fowler and nephew of Frank. Their privilege against self-incrimination was in each case asserted not by them personally, but by the attorney for Ernest Frank Fowler who, when the witness was called to the stand, announced to the court that he represented the witness as well. The witness was thereupon declared a hostile witness, and the government attorney was permitted to pose leading questions as on cross-examination. In turn, upon request of Frank Fowler's attorney, the court instructed the witness not to answer the question until the Fifth Amendment objection was made and ruled upon. Most of the challenged cross-examination involved Pruitt Fowler, who was called by the government four times. Arnold was called twice and Terry once. Generally the questions went to the witness' knowledge of certain vehicles named in the overt acts of the indictment, their own activities regarding those vehicles, and Frank Fowler's activities. Because of the invocation of the Fifth

Amendment provilege, little testimony was actually elicited.

A careful examination of the questions put to the witness confirms the defense claim that the factual assertions in the leading questions were indeed suggestive of Frank Fowler's involvement, in the conspiracy.[7] As such, they are not unlike those questions which brought about reversal of the defendant's conviction in *United States v. King*, 461 F.2d 53 (8th Cir. 1972).

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7. The following interrogation of Pruitt Fowler by the government attorney is illustrative:

Q. Mr. Fowler, do you recall the 1969 Chevrolet Malibu automobile, a white car with a black top—

MR. SCOTT: Objection.

BY MR. PARTIN:

Q. —on which you accompanied your brother, the Defendant Frank Fowler, to Blythesville, Arkansas?

MR. SCOTT: Objection.

THE COURT: Sustained.

BY MR. PARTIN:

Q. Isn't it true that after your brother Frank sold the automobile to T & G Auto Sales that he brought the pickup truck which he received in trade back to Kentucky?

MR. SCOTT: Objection.

THE COURT: Sustained.

BY MR. PARTIN:

Q. Isn't it true that you knew that 1969 Chevrolet Malibu was a stolen car?

MR. SCOTT: Objection.

THE COURT: Sustained.

BY MR. PARTIN:

Q. Isn't it true that you had conversations with your brother, the Defendant Frank Fowler, about the stolen nature of that car?

MR. SCOTT: Objection.

THE COURT: Sustained.

BY MR. PARTIN:

Q. Wasn't this car picked up at Paris, Tennessee, from Jim Bridges and your brother, Frank Fowler, after which you all went to Blythesville, Arkansas?

MR. SCOTT: Objection.

THE COURT: Sustained.

Several distinctions between the facts here and those in *Douglas v. Alabama* are apparent. In *Douglas v. Alabama* the full confession was read to the jury as the statement of the witness and the giving of the confession was confirmed by three other witnesses. Here, of course, no statement as such was read, and any injury must come from the inference that "resort to privilege in each instance is a clear confession of crime." 8 Wigmore, Evidence, § 2272 at 426 (McNaughton rev. 1961). Further, the trial judge repeatedly admonished the jury not to consider the government's questions as having "any evidentiary value whatsoever". Finally, there is upon the record here, at least some merit in the government's assertion that invocation of the privilege came as a surprise in view of the earlier disclosed willingness of the witnesses to testify.

The Fifth Amendment privilege against self-incrimination is a privilege personal to the witness. *United States v. Goldfarb,* 328 F.2d 280 (6th Cir. 1964). As such, it is not the property either of his attorney or of the defendant on trial. 8 Wigmore, *supra,* § 2270; *Goldfarb, supra.* While the witness is entitled to the advice of counsel before determining whether he should invoke the privilege, *United States v. Compton,* 365 F.2d 1 (6th Cir. 1966), and while it is within the discretion of the trial judge to permit counsel for the witness to invoke the privilege on his behalf, 8 Wigmore, *supra,* § 2270, the nature of the privilege is such that in the final analysis the controlling decision is that of the witness himself. In short, Ernest Frank Fowler possessed no right to have Pruitt, Arnold or Terry assert the privilege. Neither did defendant Frank Fowler's attorney. *United States v. Goldfarb, supra; Lopez v. Burke,* 413 F.2d 992 (7th Cir.

1969); *United States v. Skolek*, 474 F.2d 582 (10th Cir. 1973).

We recognize that it is not possible always to know in advance if the privilege will in fact be invoked when a given question is asked. and further whether, if invoked, the question is properly subject to the privilege. Since the government has the obligation to present such relevant testimony as the witness may possess, it must in turn have a reasonable opportunity to test whether that testimony will be forthcoming, and if not, whether it can be compelled. Nor do we go so far as to hold that in testing the privilege the government must do so out of the presence of the jury. Experience shows that apprehended difficulties with proof often evaporate when put to the actual test of the trial. There may be a constitutional privilege against testifying and at the same time be a powerful incentive to get on the stand and tell the truth. The alternatives for the witness are seldom easy.

Bearing in mind all of the foregoing considerations, we are nevertheless unable to approve the conduct of the government in its questioning of the witness, particularly Pruitt Fowler. In short, it went too far and exceeded the reasonable bounds which might have been necessary to test the privilege. We need not decide whether the Confrontation Clause, as applied in *Douglas v. Alabama*, should extend to this form of interrogation. The extensive nature of the questioning, after determining that the witness would continue to invoke the privilege, was in any event an unfair trial tactic on the part of the prosecution. Thus, we would seriously consider reversal of Frank Fowler's conviction, were it not that the entire circumstance appears to have been the contrivance of the defendant himself.

When Pruitt Fowler was first called to the stand, Mr. Scott, the attorney for defendant Frank Fowler, addressed the court:

> "Your honor, on behalf of the witness Pruitt Fowler, I am respectfully instructing the witness Pruitt not to answer any questions on the basis of his constitutional right to remain silent."

Thereafter, Scott closely guarded the witness and completely frustrated the government's efforts to question him. Nowhere does it appear that Pruitt Fowler himself sought personally to invoke the privilege, or even wanted to. On the contrary, when allowed the opportunity to answer questions held not subject to the privilege, Pruitt acknowledged that he had earlier told the government agents that he didn't want an attorney, that he wanted to answer questions, and that when he arrived at the courthouse that morning from Arkansas that he had fully expected to testify for the prosecution.

It thus appears upon the record here that Pruitt Fowler's refusal to testify was directly procured by the defendant, acting through his counsel, and the record is far from satisfying that the witness was "acting entirely on his own interests in doing so", *Douglas v. Alabama, supra.*

It was argued before the trial bench that Attorney Scott, in asserting the privilege on behalf of the witness, was doing so solely as counsel for the witness and that consequently his conduct is not chargeable to the defendant. The unseemly conduct of Mr. Scott in purporting to "wear two hats", (thus enabling him to appear to abandon the rights of the defendant he was bound to defend in favor of the rights of the witness) does not commend

itself to us, nor should it have, we think, to the trial court. Nevertheless, Scott succeeded in protecting his client, the defendant, from the impact of the potential testimony of his client, the witness, and beyond that, succeeded in obtaining the blessing of a court instruction to the jury that he might properly do so.[8]

The unfairness which amounts to a denial of the right of confrontation is the frustration of the accused's right to face his accuser and challenge the truth of the accusation. *Douglas v. Alabama, supra.* The unfairness disappears when the accused deliberately brings about that denial in furtherance of his own interests.

It is apparent to us that here the conduct of the defendant's own counsel, in which we must assume defendant concurred, was directed not to the protection of the witness, but rather to the protection of the defendant himself. Faced with the almost certain knowledge that Pruitt Fowler was about to testify against his own brother,

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8. Mr. Scott made repeated references to his dual capacity, each time requesting the trial court to sanction his conduct. For example, prior to the interrogation of Terry Fowler, the following colloquy took place:

MR. SCOTT: If the Court please, I assume that it would not be necessary for me to restate the fact that my advice to Mr. Terry Fowler was as his attorney, not as the Defendant Frank Fowler's attorney. And though I wear both hats in this court, the right not to incriminate himself is a right individual to Mr. Terry Fowler, the witness, and it has nothing to do and should not be construed as any reflection upon the Defendant Frank Fowler.

THE COURT: Correct.

Members of the jury, a witness who is called has a right to the advice of counsel. Mr. Scott represents both these men, Mr. Terry Fowler and Mr. Pruitt Fowler as their attorney. That does not mean that their testimony in any way interferes with his representation of Mr. Ernest Fowler—what is his middle name,

counsel for Ernest Frank Fowler concluded, no doubt with good reason, that the best interests of the defendant lay in avoiding the impact of the brother's testimony by invoking the Fifth Amendment privilege on his behalf. Thus, while there was indeed a risk to his client of creating in the jury's mind an association between his client, the defendant, and his purported client, the witness and brother, it was no worse a risk than the potential prejudice which would come from the actual testimony of the brother on the stand.

The record convinces us that the refusal of each of the three witnesses to answer was, in fact, "procured" by the defendant through his own counsel. *Douglas v. Alabama, supra,* at 420. He cannot now be heard to complain that he was denied the right of cross-examination and confrontation when he himself was the instrument of the denial.

B. L. C. Cook: Hearsay to establish conspiracy

Defendant L. C. Cook contends the hearsay evidence was erroneously admitted to connect him with the conspiracy and that his conviction should therefore, be reversed. He asserts that a prima facie case of the existence of the conspiracy and his connection with it must be established independently of hearsay testimony admitted under the co-conspirator exception to the hearsay rule, relying upon *Glover v. United States,* 306 F.2d 594 (10th Cir. 1962). He claims that such independent evidence was not presented and that hearsay testimony of unindicted co-conspirator Barry Lynn Clayton was necessary to link him to the conspiracy.

Specifically, he objects to Clayton's testimony that Billy Mayes had told him that he, Billy Mayes, was going to

drive the car to the residence of L. C. Cook . . . the potential buyer of this altered vehicle. Clayton further testified that to the best of his recollection "Mr. Mayes said that L. C. Cook had ordered this car for the purpose of an insurance fraud."

We agree that a prima facie case of the conspiracy and the defendant's connection with it must be established by evidence independent of that offered as an admission of a co-conspirator. *South-East Coal Company v. Consolidation Coal Company*, 434 F.2d 767 (6th Cir. 1970); *Carbo v. United States*, 314 F.2d 718 (9th Cir. 1963), cited with approval in *South-East Coal, supra.* See also *Glasser v. United States, supra,* at 74. However, a prima facie case is less than proof beyond a reasonable doubt; indeed, it is less than a preponderance. *South-East Coal, supra,* at 779. Moreover, the prima facie case need not be established before the proffered hearsay may be admitted; the judge may admit it conditionally. It is sufficient if at the close of the government's proofs, a prima facie case of the conspiracy and the defendant's connection with it has been established by "independent or disassociated evidence". *South-East Coal, supra,* at 788.

While the hearsay evidence contained in Barry Lynn Clayton's testimony was relevant to the ultimate issue of whether defendant Cook had participated in the conspiracy, it was not the only evidence of that participation. Upon a review of the record, we conclude that the necessary prima facie case had been made by the government independent of Clayton's testimony. The admission of the challenged evidence was, therefore, proper.

C. Jimmy Thompson: Double jeopardy

Defendant Jimmy Thompson claims that his Fifth Amendment right not to be placed twice in jeopardy for

the same offense was violated when he was brought to trial below, after having previously been brought to trial on conspiracy charges involving what he claims was the same auto theft ring. In 1971, Thompson was indicted on a charge of conspiracy to violate the Dyer Act and was brought to trial in Indianapolis, Indiana. After the jury had been sworn and the trial commenced, the government moved for dismissal of the charges. The motion was granted and the indictment against Jimmy Thompson in that case was dismissed.

The essence of Thompson's claim is that there was only one conspiracy, and that the Indianapolis trial of the conspiracy charge barred a subsequent charge of participation in the conspiracy because jeopardy had attached in the first trial.

If the two alleged conspiracies were in fact but one, we would be compelled to uphold Thompson's claim of double jeopardy, *United States v. O'Dell*, 462 F.2d 224, 226 n.2 (6th Cir. 1972); *United States v. Sarullo*, 74-1273, 1274 (6th Cir. decided and filed _____, 1975); unless dismissal of the first indictment was required by "manifest necessity" and "the ends of public justice". *Illinois v. Sommerville*, 410 U.S. 458, 464-5 (1973); or unless the claim was waived.

It is true, of course, as the government notes, that different overt acts involving Thompson were spelled out in each indictment. This circumstance is not controlling. Agreement is the primary element of a conspiracy, *United States v. Varelli*, 407 F.2d 735 (7th Cir. 1969), and a single conspiracy may embrace many overt acts, including many substantively illegal acts. *United States v. Braverman*, 317 U.S. 49 (1942). It is only the conspiracy which

is punished and not its objects. *United States v. Wallace Fruit, et al.*, No. 74-1518 (6th Cir. decided and filed Dec. 9, 1974). Thus, to convict an individual for being part of two conspiracies when he is in reality a part of only one is to convict him of the same crime twice. *United States v. Palermo*, 410 F.2d 468 (7th Cir. 1969). The government may not sever a single plot or agreement into more than one in order to increase penalties or the likelihood of success. *United States v. Wilshire Oil Co.*, 427 F.2d 969 (10th Cir. 1970).

The burden, however, is upon the defendant to prove by a preponderance of the evidence that the indictments charged a single conspiracy. *United States v. O'Dell, supra; United States v. Nathan*, 476 F.2d 456 (2nd Cir. 1973); *United States v. Wilshire, supra.* We conclude that that burden has not been met here. The district court below, while initially denying Thompson's motion to dismiss on double jeopardy grounds, informed counsel that he would provide him an opportunity to be heard on the issue following the close of the government's proofs. Counsel for defendant indicated that he would file a written motion raising his double jeopardy objections to the indictment and trial. The record reflects that no such motion was filed. Thompson's failure to meet his burden on this issue was not, therefore, attributable to the trial court in any way.

Since defendant Thompson has failed in his burden to show that his conviction in Bowling Green was for the same offense as that charged in the Indiana indictment, we need not and do not reach the question of whether he waived his double jeopardy rights, or whether the necessity doctrine enunciated in *Illinois v. Somerville, supra,* would have applied to the dismissal of the Indiana indictment so as to permit retrial without running afoul of the Fifth Amendment.

D. Lewis Bewley: Double jeopardy

Defendant Bewley claims that he has been placed in double jeopardy. Specifically, he asserts that his prior plea of guilty to receiving and concealing a stolen automobile, precludes his conviction for conspiracy to violate the Dyer Act when his alleged connection to the conspiracy involved the same auto. We do not agree. The substantive and conspiracy offenses do not merge, and a conviction of both does not violate the principles of double jeopardy. *United States v. Bradley,* 421 F.2d 924 (6th Cir. 1970).

E. Newberry and Crawley: Hearsay evidence

Defendants Newberry and Crawley claim that certain hearsay statements of alleged co-conspirators were erroneously admitted by the district court, in that they were not shown to have been made during the life of the conspiracy. It is, of course, true that statements of one co-conspirator are normally admissible against another only where they are made during and in furtherance of the conspiracy. *Krulewitch v. United States,* 336 U.S. 440 (1949).

In the absence of plain and prejudicial error, however, this court will not disturb a verdict on the basis of erroneously admitted evidence unless a specific and timely objection was made. *Metcalf v. United States,* 195 F.2d 213 (6th Cir. 1952). F.R.Crim.P. 52(a) and (b).

Defendants first object to the testimony of co-conspirator James Wilson to the effect that Billy Mayes had told him he had delivered certain automobiles to defendant Newberry. This was objected to by counsel for defendant Newberry, who stated: "Objection, your Honor, unless he saw them." This objection did not apprise the trial judge

of the ground now asserted on appeal, i.e., failure to identify the time of the statement, as is required by F.R.Crim. P. 51. We, therefore, do not consider it.

Defendants raise the same objection to certain testimony of co-conspirators Barry Lynn Clayton. As to one portion objected to, there was no objection made at trial at all, and we decline to consider the claim for the first time on appeal.

Defendants did, however, move to strike testimony of Clayton that "Billy Mayes told me where he and Osborn had taken a '68 white Firebird from Burke's Pontiac over to Lafayayette, Tennessee, to Don Newberry." Counsel for defendant Newberry, Mr. Stafford, made no objection at that time, although he did make reference to objection and discussion of the previous day. While declining to state any objections he had to that evidence, Mr. Stafford stated that he would state the grounds for his objection at a later time. On the following day, after the prosecution had closed its case, Mr. Stafford moved to strike the evidence, stating that it was not shown to have been made during the conspiracy. We hold that the trial court did not abuse its discretion in refusing to strike the testimony, even assuming that there was a failure to show the time the statement was made. There was no indication that it was not made during the conspiracy, and because of the delay in asserting the issue, the government was effectively precluded from demonstrating that it was. This court stated in *Metcalf v. United States, supra:*

> "It is the well settled rule that objections to evidence should be timely made when the evidence is offered, and that it is within the discretion of the trial judge to sustain or overrule a motion, delayed until the

close of the Government's case, to strike from the consideration of the jury evidence previously received without objection." 195 F.2d at 216

We conclude, therefore, that no error was committed in the admission of these statements.

CONCLUSION

In a trial of this magnitude, it is of course inevitable that some errors both in judgment and in law may have occurred, errors which in another trial might be cured only to be replaced by others as yet unknown. Our careful review of the entire record of this case, however, convinces us that there was sufficient and substantial evidence to support the jury convictions of each of the appellants, that the jury was fairly and fully instructed in the law, and that no reversible error intervened to deprive any of the defendants of a fair trial.

Affirmed.

APPENDIX "B"

18 U.S.C. § 371: *Conspiracy to commit offenses or to defraud United States*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 2312: *Transporation of stolen vehicles*

Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. § 2313: *Sale or receipt of stolen vehicles*

Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.